

Review
Arena Construction Manager Selection

January 2005

City Auditor's Office
City of Kansas City, Missouri

January 26, 2005

Honorable Mayor and Members of the City Council:

You requested that we review the process the city used to recommend a construction manager for the downtown arena project. Some members of the City Council and representatives of the local construction industry have expressed concern that the selection committee recommended a non-local company to manage the project. We designed our review to assess whether city staff and officials followed a valid selection process to recommend a construction manager for the downtown arena. We used a three-pronged test to assess the validity of the process:

- Did the process treat bidders fairly?
- Did the city do what they said they would do?
- Did all key players understand the process?

We conclude that the city met the first two tests, but not the third.

We found no evidence that the selection process was biased toward a specific result. The city's process treated bidders fairly as all bidders had the same access to information and opportunities to present information. The Invitation for Bid (IFB) and addenda described the process and criteria by which the selection team evaluated bids. The addenda changes did not alter the ranking of the bidders. The IFB did not give preference to local bidders and the city cannot lawfully express a preference for local bidders after the fact. Nor did the IFB require bidders to specify MBE/WBE partners in the bid.

However, a selection process should both be fair – that is treat bidders consistently – and appear to be fair – that is be understood by the key players including bidders, the selection committee and the City Council, which is responsible for approving the selection. In this case, confusion about how the selection committee scored technical proposals and confusion about the role of Anschutz Entertainment Group's representative in the selection marred the credibility of the process. The downtown arena is the city's first project working with a private investor/business partner and the first time the city has used the construction manager at risk method of contracting for construction management. Because procedures were not already in place and the project is on a tight schedule – expected to be completed March 2007 – staff hurried in implementing the new, complicated process. The City Manager and others agree that more communication up front about the selection process would have been helpful.

We provided a draft of the report to the City Manager on January 21, 2005. Management's response is appended. We appreciate the courtesy and cooperation extended to us during this project by city staff, consultants, and those in the construction industry.

Mark Funkhouser
City Auditor

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Introduction

Objectives

The Mayor and City Council requested we review the process used to recommend a construction manager for the downtown arena project after stakeholders raised concerns about the selection of an out-of-town contractor. We designed the review to assess:

- Did city staff and officials follow a valid selection process to recommend a construction manager for the downtown arena?

Scope and Methodology

We focused our review on documents and events related to the city's process to select a construction manager for the project between May and December 2004. We did not review how the city selected its design team lead by HOK Sports+Venues+Events; operator, Anschutz Entertainment Group (AEG); and other consultants on the project, Burns & McDonnell, PC Sports, HNTB, Taliaferro and Browne, Astra Communications, Custom Engineering, AnLab, Wellner Architects, Leigh and O'Kane, Horrow Sports Ventures, and Krueger Technologies, because these selections were not directly related to our objective and due to time constraints. We followed generally accepted government auditing standards for performance audits while conducting this review.¹ Our methods included:

- Reviewing legal and regulatory requirements for selecting a construction manager at risk.
- Interviewing stakeholders and participants in the process including city staff and consultants, bidders, members of the selection committee, and local industry representatives. (See Appendix A.)

¹ Comptroller General of the United States, *Government Auditing Standards* (Washington, DC: U.S. Government Printing Office, 2003).

- Compiling a timeline of events and documents related to the selection process including press releases, emails and other correspondence, meeting agendas, and bid documents. (See Appendix B.)
- Developing a model to describe a valid selection process. (See Appendix C.)

We omitted no privileged or confidential information from this report. We attempted to schedule an interview with representatives of PCL, but they were unable to meet with us as of January 19, 2005.

Background

Kansas City Downtown Arena Project

The city plans to build an 18,000- to 20,000-seat arena downtown. The total project budget is \$250 million including land acquisition and is scheduled for completion in March 2007. The voters approved funding for the arena on August 3, 2004, by raising hotel and rental car fees. The arena will be one of a number of anchors in the city's renewed central business district, along with the expansion of the Bartle Hall Convention Center, the Performing Arts Center, the H&R Block Headquarters building, and the KC Live entertainment district, all currently under development.

Construction Manager/General Contractor at Risk

The city is using the construction manager/general contractor at risk method of managing the arena's construction. A construction manager at risk contract is a common industry practice intended to maintain schedules and keep costs down. Under this contract management method, the construction manager at risk is responsible for completing the project on-time and on-budget and assumes risks for cost overruns. The final contract is based on a guaranteed maximum price, which reduces the owner's risk of cost overruns. State law differentiates between two types of construction managers for which different requirements apply. State law requires a construction manager at risk contract be bid rather than negotiated.

The Selection Committee

The members of the selection committee were:

Mayor Kay Barnes
City Manager Wayne Cauthen
Assistant City Manager Rich Noll
Convention and Entertainment Centers Director Oscar McGaskey
Acting Director of Public Works Stan Harris
City Councilman Terry Riley
Tim Romani, Romani Group.

Others attending the technical presentations and interviews with bidders were:

Ralph Davis, CIMO Program Delivery Manager
Blake Ellis, Burns & McDonnell
John Hilkene, PC Sports
Greg Williams, Mayor's Office
Marc Farha, Romani Group
Ben Barnert, HOK-SVE
Rick Martin, HOK-SVE
Bob Herrfeldt, Horrow Sports Ventures.

HOK-SVE is the design team for the arena. Burns & McDonnell, PC Sports, and Horrow Sports Ventures are consultants working for the city on the project. Romani Group is a consultant working for Anschutz Entertainment Group (AEG) on the project.

Findings and Recommendations

Summary

While some City Council members and representatives of the local construction industry have expressed concern that the selection team recommended an out-of-town company to manage the downtown arena project, we found no evidence that the selection process was biased toward a specific result. The city's process treated bidders fairly as all bidders had the same access to information and opportunities to present information. The Invitation for Bid (IFB) and addenda described the process and criteria by which the selection team would evaluate the bids. The addenda changes did not alter the ranking of the bidders. The IFB did not favor local bidders and the city cannot lawfully express a preference for local bidders after the fact. Nor did the IFB require bidders to identify MBE/WBE partners in the bid.

We found no indications of bias in the selection committee deliberations and the committee as a group developed an official score ranking Mortenson first. However, confusion about how the selection committee scored technical proposals and confusion about the role of Anschutz Entertainment Group's representative in the selection marred the credibility of the process.

The downtown arena is the city's first project working with a private investor/business partner and the first time the city has used the construction manager at risk method of contracting. Because procedures were not already in place and the project is on a tight schedule – expected to be completed March 2007 – staff hurried in implementing the new, complicated process. The City Manager and others agree that more communication up front about the selection process would have been helpful.

We recommend the City Manager ensure that agreements with AEG, Sprint, the National Association of Basketball Coaches and any other agencies that will be partners or tenants in the downtown arena clearly define the agency's role in completing the project. The City Manager should submit all agreements to the City Council for deliberation and approval. We also recommend the City Manager develop written procedures for using the construction manager/general contractor at risk method for managing construction projects.

Committee's Recommendation to Select Mortenson Was Unbiased

We found no evidence that the city's selection process was biased toward a specific result. The result of the consensus scoring reflected the committee's view that Mortenson's bid was the best for the city.

Process Treated Bidders Fairly

The city's process for selecting the construction manager at risk for the downtown arena treated all bidders consistently. The city complied with advertising and bid requirements. Bidders had equal access to information and the same opportunities to present information to the selection committee. Each bidder team understood and had experience as a construction manager at risk. The selection committee's consensus scoring of the technical component was a reasonable process and produced a result consistent with how committee members told us they ranked the technical proposals.

Process complied with legal requirements. The City Charter requires that the city advertise public improvement bid opportunities in the newspaper doing the city's printing for at least five days during the 20-day period before bids are due. The city advertised the arena IFB for 9 days in the *Daily Record* beginning November 11, 2004, in *The Kansas City Star*, *Springfield News-Leader*, and *St. Louis Post-Dispatch* for 10 days beginning November 10, 2004, and on the internet. The city also notified potential bidders that had requested notification of upcoming bid opportunities.

Missouri statutes define and outline requirements public entities must follow in obtaining construction management services. In seeking a construction manager at risk, the city was required to use competitive bidding rather than a negotiated price component. The IFB met this requirement.

Bidders had the same access to information and opportunities to present information. The IFB was publicly available on November 10, 2004, and the city held a mandatory pre-bid conference November 17, 2004. The city issued four addenda between November 22 and November 30, 2004, which answered potential bidders' questions, announced changes in the process, and provided additional information. All bidders had equal access to the IFB and addenda and had the opportunity to submit questions to obtain additional information. Four teams of bidders met the submission deadline of December 2, 2004:

- PCL Construction Services, Inc.
- J.E. Dunn/Hunt a joint venture in association with Malco Steel, Inc.
- Team Arena (Walton, Greenleaf, Turner, and Phillips-West)
- M.A. Mortenson Company.

Bidders provided technical proposals and price bids separately as required. Staff provided the selection team with the technical approach proposals December 3, 2004. City staff kept the sealed price bids in a locked cabinet until the public opening and reading December 9, 2004.

Each of the teams made a formal presentation to the selection committee December 7, 2004. The selection committee allowed each team a 45-minute presentation and provided a question and answer period.

Bidders understood construction manager at risk. Construction manager at risk is a common practice in the industry. All bidder teams had experience working as a construction manager at risk and understood the practice based on their technical approach submissions.

Consensus scoring was a reasonable process. The selection committee scored each proposal as a group. A consensus approach encourages all members of a committee to participate, helps ensure the committee thoroughly explores options, and resolves strong disagreements. Although everyone in the committee may not agree with the selection, they should be able to support the decision. Some selection committees make decisions by voting, where a majority rules. But a simple voting approach allows committees to reach decisions without necessarily considering different opinions. Because consensus scoring has significant benefits, the decision to use it in this process was reasonable.

The selection committee as a whole generated scores for the technical proposals following discussion of the written technical submissions and bidders' presentations. The committee discussed each bidder's presentation and written materials after each presentation, capturing their thoughts while the next bidder set up its presentation. After all bidders completed their presentations, the committee used techniques for group decision-making including a "straw poll," discussion, ranking bidders and developing an unofficial, consensus score for each. Individual committee members did not formally score the bidders.

Committee members continued to discuss bidders on the second day of meetings. On both days, four members of the selection committee ranked Mortenson as their first choice, and two ranked Team Arena first. On the second day, the selection committee as a group developed an

official numeric rating for each bidder. The official scores reflected the committee's ranking of the bidders, Mortenson first and Team Arena second. The selection committee evaluated and generated scores for each of the components as described in the IFB and addenda.

Exhibit 1. Scoring Framework for Technical Approach

Component	Maximum Possible Score
Prior Experience	25 points
Organization and Key Personnel	25 points
Project Understanding and Approach	25 points
Project Controls Plan	15 points
Project Safety and Health	10 points
Total	100 points

Source: Invitation for Bid and Addendum 2.

Exhibit 2. Selection Committee's Scores for Technical Approach

	<u>PCL</u>	<u>D/H</u>	<u>W/G/T</u>	<u>M</u>
Exp.	17	20	21	25
Pers.	8	11	21	25
Understanding	15	15	22	24
Project Control	12	9	11	15
Safety	7	7	8	10
	<u>59</u>	<u>62</u>	<u>83</u>	<u>99</u>

12/8/04

CM/GC
Arena

Source: Rich Noll provided us with the selection committee's official tally of bidders' scores for technical approach.

The bidders' total final scores included the price component, which was calculated after the selection team arrived at its scores for technical approach. The maximum price score was also 100 points. The total possible score was 200 points.

Exhibit 3. Final Scores

	PCL	Dunn/Hunt	Team Arena	Mortenson
Technical	59	62	83	99
Price	65	97	90	98
Total	124	159	173	197

Source: Selection Committee.

Participants described the process consistently. The members of the selection team that we talked to described the city's selection process consistently. Because participants have the same understanding of what occurred and it is consistent with the timeline we compiled from documents, we conclude the city's process operated as intended.

Changing the Scoring Method Didn't Affect the Outcome

Changes in the scoring method issued after the IFB was released but before bids were due did not affect the outcome as Mortenson scored higher than the other bidders on both the technical approach and price under either scenario. Some stakeholders questioned whether changes in the scoring method benefited a particular bidder.

City staff told us the changes were intended to put more emphasis on qualifications and less on price differences. While the city notified all bidders of the change before the bid was due and all bidders had the same amount of time to respond, contracting best practices include using fixed, clearly defined and consistent scoring scales to measure the proposal against the criteria specified in the IFB.² The changes in scoring method did not benefit a particular bidder, but it would have been preferable to have established the scoring method before releasing the IFB.

Revised scoring weights for the technical approach section resulted in minimal changes. The city issued addendum 2 to the IFB November 23, 2004. The addendum answered several questions about the IFB and revised answers provided in addendum 1. The addendum also changed how the city would score the technical and price proposals. Mortenson scored highest in all categories of the technical approach section by either scoring method. The changes affected maximum scores in two of five components of the technical approach section. The original IFB gave Part II (Organization and Key Personnel) a maximum score of 20 points and part III (Project Understanding and Approach) a maximum score of 30 points. Addendum 2 changed the maximum score making

² *Contracting for Services: A National State Auditors Association Best Practices Document*, National State Auditors Association, 2003.

Parts II and III equal at 25 points. We calculated the technical approach section with the original weights and Mortenson's score remained the highest.

The top chart of Exhibit 4 shows what the scoring would look like if the original scoring weights were used. The chart below displays how the selection committee scored each bidder on the five components that made up the technical approach section of the IFB. To calculate the scoring difference we found the percentage of the maximum points each bidder received using the scoring method changed by Addendum 2 and applied that percentage to the maximum points each bidder could have received using the original scoring weights.

Exhibit 4. Comparison of Technical Approach Scores Under Original and Revised Methods

Technical Approach-Original Method						
Category		Max Pts.	Bidder Score			
			PCL	Dunn/Hunt	Team Arena	Mortenson
Part I	Prior Experience	25	17	20	21	25
Part II	Organization & Key Personnel	20	6.4	8.8	16.8	20
Part III	Project Understanding & Approach	30	18	18	26.4	28.8
Part IV	Project Controls Plan	15	12	9	11	15
Part V	Project Safety & Health	10	7	7	8	10
Total Points		100	60.4	62.8	83.2	98.8

Technical Approach-Addendum 2 Method						
Category		Max Pts.	Bidder Score			
			PCL	Dunn/Hunt	Team Arena	Mortenson
Part I	Prior Experience	25	17	20	21	25
Part II	Organization & Key Personnel	25	8	11	21	25
Part III	Project Understanding & Approach	25	15	15	22	24
Part IV	Project Controls Plan	15	12	9	11	15
Part V	Project Safety & Health	10	7	7	8	10
Total Points		100	59	62	83	99

Source: Selection Committee scores and scoring methods from the Invitation for Bid (11/10/04) and Addendum 2 (11/23/04).

Revised price scoring raised all bidders' scores. The price scoring method initially described in the IFB awarded the bidders maximum scores of 70 points for the lowest base bid and 30 points for the lowest change order bid. Scores for the higher base bids were deducted two times the percentage point difference from the lowest bid, up to a maximum deduction of all 70 points. Scores for the higher change order bids were deducted two points for every one-tenth percentage point difference from the lowest change order bid, up to a maximum deduction of all 30 points.

Addendum 2 increased the maximum points for the lowest base bid to 80 and changed the deduction for higher bids to one point for each percentage point difference from the lowest bid. The maximum deduction decreased to 25 points. The score for the lowest change order bid decreased to 20 points with one point deducted from higher bids for every one-tenth percentage point difference from the lowest change order bid. The maximum deduction decreased to 10 points. If two or more bidders had the lowest base bid or change order bid, each would receive the maximum points allowed.

We calculated the price scoring section using the original weights and Mortenson's score remained the highest. The top chart in Exhibit 5 shows what the scoring would look like if the original scoring weights were used. The chart below displays the price scoring of the bids per Addendum 2 of the IFB.

Exhibit 5. Comparison of Bid Scores Under Original and Revised Methods

Bid Scoring-Original Scoring				
	PCL	Dunn/Hunt	Team Arena	Mortenson
Base Bid Price	\$14,131,651	\$9,610,000	\$9,375,000	\$9,503,958
% above Low Bid	50.74%	2.51%	N/A	1.38%
Percent Rounded	51	3	N/A	2
Base Bid Score	0	64	70	66
Change Order %	8.00%	0.00%	3.50%	0.00%
Difference from Lowest	8.00%	N/A	3.50%	N/A
Change Order Score	0	30	0	30
Total Score	0	94	70	96

Bid Scoring-Addendum 2 Scoring				
	PCL	Dunn/Hunt	Team Arena	Mortenson
Base Bid Price	\$14,131,651	\$9,610,000	\$9,375,000	\$9,503,958
% above Low Bid	50.74%	2.51%	N/A	1.38%
Percent Rounded	51	3	N/A	2
Base Bid Score	55	77	80	78
Change Order %	8.00%	0.00%	3.50%	0.00%
Difference from Lowest	8.00%	N/A	3.50%	N/A
Change Order Score	10	20	10	20
Total Score	65	97	90	98

Source: Price submittals and scoring methods from the Invitation for Bid (11/10/04) and Addendum 2 (11/23/04).

IFB Didn't Favor Local or Nonlocal Firms

Several members of the City Council and representatives of the local construction industry expressed concern that the selection team recommended an out-of-town company to manage the high-dollar, high-

profile project. The assumption that the IFB put an emphasis on local knowledge and therefore local firms was unwarranted. The IFB asked for the city and state where key personnel reside. A representative of Team Arena told us that they assumed that local residency was an important factor in evaluating bids. However, local residency during the project could be interpreted to be just as important as permanent local residency because the IFB also asked which key personnel would take up Kansas City, Missouri, residency and be assigned to the site full-time. The IFB does not indicate a preference for one over the other.

Team Arena, a local organization made up of local Kansas City firms, also questioned how in the bid section “project understanding and approach,” they could have scored lower than the out of town firm, Mortenson. Exhibit 6 shows the information required of the bidders in this section. Again, there is no indication in this section of the IFB that local firms would be favored. The items do not require local knowledge. All of the arena bidders are accustomed to preparing bids for out of town business. For example, Team Arena listed Nationwide Arena in Columbus, OH; J.E. Dunn/Hunt listed Conseco Fieldhouse in Indianapolis, IN; and PCL listed Staples Center in Los Angeles, CA, as comparable projects their team members have executed through the complete construction process.

Charter Does Not Provide for Any Local Preference

The City Charter does not provide for a local preference. The charter says all contracts shall be awarded to the lowest and best bidder after a competitive process. The Council can enact ordinances to establish a local preference. State law may allow the city to impose a local preference when it is not done on an ad hoc basis. No local preference ordinance has been passed by the Council.

The competitive process laid out in the IFB did not establish a local preference. Imposing a local preference after the acceptance of bids is not legal.

Missouri contracting rules allow a preference for in-state bidders when the bids received are equal or comparable.³ This rule does not apply because Mortenson scored higher than the other bidders. Missouri contracting rules also allow a state preference when the non-local bidder is from a state that imposes a preference for local companies.⁴ This rule also does not apply because Mortenson is located in Minnesota. Minnesota, like Missouri, doesn’t give a state preference unless a non-

³ Mo. Rev. Stat. §34.073.1.

⁴ RSMo §34.076.1.

local company is from a state that gives a preference to vendors from that state.⁵

Exhibit 6. Technical Approach III – Project Understanding and Approach

C. TECHNICAL APPROACH III – PROJECT UNDERSTANDING AND APPROACH (Bidder shall provide information for each of the sections below.)

(1) Discuss the Bidder's past MBE / WBE project performance and compliance with participation goals on comparable size commercial projects (preferably with the Construction Manager At Risk approach) performed on a multiple contract basis. Describe the CM@Risk's MBE/WBE involvement approach in detail and demonstrate past project achievements.

(2) Discuss generally the major construction activities and tasks involved in constructing the Project.

(3) Illustrate clearly and concisely, the Bidder's understanding of the technical elements that must be addressed for successful completion of the Project within anticipated budget and meeting the preferred schedule.

(4) Submit a labor study that assesses the labor availability to meet the project labor needs.

(5) Describe key issues that might affect the Project schedule and how Bidder proposes to address them.

(6) Discuss Bidder's understanding of the traffic control required for the Project, if applicable, and how traffic control will impact the Project schedule. Discuss any major traffic control issues that need to be addressed and Bidder's proposed solutions.

(7) Identify any other special issues or problems that are likely to be encountered. Outline the manner in which Bidder suggests resolving them.

(8) Outline key community relations issues and how they might be resolved.

(9) Describe any difficulties Bidder anticipates encountering in serving the City, in light of the City's status as a municipality and public entity. Explain how Bidder plans to manage any perceived difficulties.

(10) Describe any difficulties the Bidder anticipates to construct the Project with a twenty-two (22) month construction schedule and how the Bidder plans to manage those difficulties. Describe alternate schedules (if any) that the Bidder believes the City should consider with the benefit to the City and examples from past projects.

Source: Addendum No. 1, 00210 Instruction to Bidders, pp. 8-9, Project Number 100-089-07770, Kansas City Downtown Arena Project Construction Manager at Risk Services, November 22, 2004.

⁵ Minn. Stat. §16C.06.

IFB Did not Require Identifying MBE/WBE Partners

Minority business enterprises and women's business enterprises (MBE/WBE) participation is one of the 10 items included in the Technical Approach Part III – Project Understanding and Approach of the IFB. Some stakeholders expressed concern that Mortenson did not specify its MBE/WBE partners in its bid while another bidder identified local minority companies and provided analysis of how they would exceed the MBE/WBE participation goals.

The IFB, however, did not explicitly ask bidders to identify MBE/WBE partners or to analyze how they would meet the goals. The IFB required bidders to describe their past MBE/WBE project performance and compliance with participation goals on comparable size commercial projects performed on a multiple contract basis. The IFB stated the participation goals that the city's Fairness in Construction Board has established – 20 percent for MBE and 12 percent for WBE. The successful bidder will be required to meet the goals or have made a best faith effort to meet them.

Confusion About Scoring and Roles Marred Credibility

While we found no evidence that the selection process was designed to favor a particular bidder, confusion about scoring and misunderstanding of participants' roles reduced the credibility of the process. The City Council has not yet selected a contractor. The project's tight timeframe contributed to misunderstanding as city staff hurried to implement a new process for which there weren't established procedures.

Roles and Scoring Misunderstood

Confusion about the process undermines the credibility of the committee's recommendation. The city should follow an open, transparent process when making decisions about the use of public funds. All key players should understand who is making decisions and the basis for their decisions. Stakeholders we talked to were confused about AEG's role in the selection process and how the scoring worked.

AEG's role was misunderstood. Several people we talked to questioned AEG's role in the selection process and said that AEG appeared to have too much influence over the process. However, the city granted AEG authority to approve selection of contractors prior to releasing the IFB. While city staff characterized AEG's role as "non-voting" in press releases and other public statements, AEG is the city's

business partner in constructing and operating the downtown arena and has significant interest and power over design and construction of the arena. AEG essentially held veto power over the city's selection.

The city and AEG entered into a nonbinding participation agreement June 30, 2004. The agreement expressed the parties' intent to negotiate a development agreement to construct and operate a downtown arena if voters approved funding for the arena in the August 3, 2004, election. AEG agreed to contribute \$50 million to the project, to manage construction costs and cover cost overruns, manage operations and assume risk for operating expenses for 35 years. The city agreed to acquire land, demolish existing structures, provide relocation services and payments to existing owners and tenants, ensure adequate parking would be available, and make any mutually agreed upon off-site infrastructure improvements. Both parties agreed to a distribution of profits by which AEG would earn profits equal to its contribution plus a cumulative annual return of 16 percent. Additional profits would first fund a capital reserve account and any remaining receipts would be divided equally between the city and AEG.

The City Council was not asked to approve the participation agreement, but will need to approve the development agreement.

AEG's role was publicly disclosed. Under the participation agreement, the city was responsible for selecting the general contractor for the arena, subject to AEG's approval. The city issued a press release describing the agreement July 15, 2004. The press release noted that the city would select the project architect and general contractor with AEG's concurrence. The participation agreement is a public document and was referred to in the IFB.

While information about AEG's role in the selection process was available, city staff has a responsibility to ensure that key players, particularly members of the City Council, understand what's going on. The City Council is responsible for approving the selection, but has not yet done so because of questions about the process. The City Manager agrees that more information up front – especially since this is the first time the city has worked with a private partner and the first time the city has used the construction manager at risk approach for construction – would have helped the selection process.

Questions about scores reflect misunderstanding of process.

Members of the selection committee raised questions about the scoring during deliberations and Council members and others have asked

questions about the scoring following the recommendation that reflect a misunderstanding of how the process was intended to work.

Discussion at the selection meeting suggests that participants didn't fully understand the scoring system. Selection committee members and AEG's representative asked questions during deliberations about how the price bids could affect the selection. Participants were concerned that small differences in price could outweigh technical merit or that a less qualified bidder could "buy" the selection with a low bid. At this point, committee members had agreed that Mortenson's was the best technical proposal, but had not yet seen the scores for the price component. Staff present at the discussion requested the City Attorney explain how the technical and price components of the score worked together. The City Attorney explained that the price score and technical score were designed to each make up half of the possible points. Because the lowest bid would receive a score of 100 if there were no deductions for change orders, the top technical bid should also receive a score close to 100 to maintain the balance between technical merit and price. After this discussion, the committee developed its consensus scoring and awarded Mortenson's technical proposal a score of 99 out of a possible 100 points.

Some Council members expressed concern about the scoring process following the selection committee's recommendation, including concern that members were pressured to change their votes and that scores were rigged to ensure that Mortenson won. First, selection committee members did not vote or complete individual scoring sheets as part of the consensus process. None of the selection committee members we talked to said that they felt pressured to support a particular firm. Council member Riley – a member of the selection committee – told us he was uncomfortable with AEG's influence on the group. However, he also said that he did not pick Mortenson as his first choice.

Mortenson was the committee's top pick in the initial straw poll and at the end of the scoring process. While Team Arena has questioned whether it is reasonable for any proposal to score 99, the difference in the scores reflect the committee's consensus that Mortenson's was technically the best bid and that the best technical bid should receive a high score to maintain the balance between technical merit and price.

Tight Timeframe Contributed to Misunderstanding

City staff we interviewed said the March 2007 goal for opening the downtown arena created a tight timeframe. City staff, on the advice of consultants, decided to use the construction manager at risk approach as

a way to speed the construction process while controlling costs. Staff developed a hybrid selection process because the city has not used the construction manager at risk approach before and does not have established processes to enter into this type of contract. Lack of established processes and the need to hurry in implementing new processes contributed to confusion about the selection.

Lack of established rules contributed to misunderstanding. City staff decided to use a new construction management approach for the arena project. Project consultants recommended the approach as a way to meet a tight schedule while controlling costs. Because the city's ordinances and procedures don't address the construction manager at risk approach, staff developed a process that combined city requirements for choosing professional services contracts, which are qualifications based, and bidding procedures.

The process gave equal weight to qualifications and experience and to price. This weighting approach was based on city requirements for design-build contracts.⁶ Staff based the general make-up of the selection committee on the city's requirements for selecting engineering, architectural, and surveyor services.⁷ Staff worked with the Law Department to ensure the process was consistent with state statute, which requires the city to competitively bid construction manager contracts, but does not exclude the use of qualifications in the selection process.⁸

Pressure to meet the March 2007 goal caused staff to shorten some parts of the IFB process. For example, staff didn't fully check references for the firms submitting bids before the selection committee made its recommendation. Burns & McDonnell checked one reference each for Team Arena, J.E. Dunn, and PCL, and two references for Mortenson – including Tim Romani of AEG – before the selection committee made its recommendation. All four bidders provided as references individuals who were part of the city's team. Contracting best practices include carefully checking vendor references.⁹ Staff also told us that the city usually extends the due date for bids by one week after issuing an addendum. In this project, the city pushed back the due date only two to three days after issuing addenda so the project would not fall behind. We saw other evidence that staff hurried through the process including revising the scoring method after releasing the IFB and cutting corners. For example, the city did not execute its contract with Burns &

⁶ Code of Ordinances, Kansas City, Missouri, Sec 2-1585.

⁷ Code of Ordinances, Kansas City, Missouri, Sec. 2-1584.

⁸ RSMo. § 8.685.

⁹ *Contracting for Services: A National State Auditors Association Best Practices Document*, National State Auditors Association, 2003.

McDonnell for program management staff extension services until after the consultants had helped write the IFB, created a summary of the technical proposals, and completed other tasks related to the project.

City staff instructed the selection panel on the design of the scoring process immediately before the bidders made their presentations. Staff told us that participants interpreted the scoring method in different ways and the City Attorney needed to come answer questions on the second day of meetings. The tight timeframe may have contributed to the selection panel's misunderstanding by not allowing adequate time for training on the design of the scoring process. Contracting best practices include using a selection committee made up of people who are trained on how to score and evaluate proposals and who are free of impairments to independence.¹⁰

More information up front would have helped avoid misunderstanding. Staff explained the concept of Construction Manager/General Contractor at risk and the selection process at the Operations Committee meeting November 3, 2004, but did not present the information to the full Council at a business session before the selection panel's recommendation. Lacking information about the scoring design, Council members began to question the credibility of the selection process. The City Manager and others we interviewed said that because it was a new process, providing more information to the entire City Council about the Construction Manager/General Contractor at risk concept and the selection process at the beginning would have helped avoid misunderstandings.

¹⁰ *Contracting for Services: A National State Auditors Association Best Practices Document*, National State Auditors Association, 2003.

Recommendations

1. The City Manager should ensure that agreements with AEG, Sprint, the NABC, and any other agencies identified as partners or tenants in the downtown arena clearly define the partner's or tenant's role in the completion of the downtown arena project. The City Manager should submit all negotiated agreements to the City Council for deliberation and approval.
2. The City Manager should develop procedures for soliciting proposals for construction projects using the construction manager/general contractor at risk method and add the procedures to the city's contract guidebook.

Appendix A

Stakeholders Interviewed

Sprint Arena Stakeholder Interview List

	Name	Title	Interview Dates
Selection Committee Members	Kay Barnes	Mayor	12/28/2004
	Wayne Cauthen	City Manager	12/23/2004
			1/10/2005
	Terry Riley	City Councilmember	1/11/2005
	Rich Noll	Assistant City Manager	12/21/2004
			1/3/2005
			1/5/2005
			1/10/2005
	Oscar McGaskey	Executive Director, Convention Center	12/27/2004
Consultants and other City Staff	Stan Harris	Acting Director of Public Works	1/4/2005
	Tim Romani	AEG Representative	12/21/2004
	Ralph Davis	CIMO Program Delivery Manager	12/28/2004
			1/5/2005
			1/14/2005
	Mike Musgrave	CIMO Program Executive	1/5/2005
	Galen Beaufort	City Attorney	12/23/2004
			1/4/2005
	Jim Brady	Assistant City Attorney	12/27/2004
City Council			1/10/2005
	Bill Luster	Burns and McDonnell	1/4/2005
	Blake Ellis	Burns and McDonnell	1/4/2005
	Becky Nace	City Councilmember	1/5/2005
	Bonnie Sue Cooper	City Councilmember	1/5/2005
	Charles Eddy	City Councilmember	1/6/2005
	Jim Glover	City Councilmember	1/6/2005
	Deb Herman	City Councilmember	1/10/2005
	Jim Rowland	City Councilmember	1/3/2005
Bidders	Alvin Brooks	City Councilmember	1/19/2005
	John Fairfield	City Councilmember	1/11/2005
	Bill Skaggs	City Councilmember	1/3/2005
	Troy Nash	City Councilmember	1/19/2005
	Saundra McFadden		
	Weaver	City Councilmember	1/5/2005
	John Wood	Mortenson	12/28/2004
	Dennis Thompson	Team Arena	12/22/2004
	Chuck Cianciauso	Dunn/Hunt	1/10/2005
Others	Emil Konrath	Konrath Group	1/6/2005

Appendix B

Timeline

Month	Day	Year	Summary
5	11	2004	The city and AEG entered into a non-binding letter of intent with respect to AEG's investment in a downtown arena project.
5	12	2004	Mayor Barnes announced plans for a new \$250 million downtown arena, financed through tax credits, hotel and car rental license fees, user fees, and private funding through partnerships with AEG, Sprint, and the National Association of Basketball Coaches.
5	20	2004	City Council passed an ordinance to put increased fees on rental car agencies and hotels on the ballot for an election on August 3. The fees would provide funds for acquisition, development, construction, operation and maintenance of a downtown arena.
6	30	2004	The city and AEG entered into a participation agreement. The agreement describes the project and responsibilities of AEG and the city; project funding; arena operations; profit sharing; and conditions of precedent.
7	1	2004	The city issued a request for qualifications (RFQ) for a program management team. The team would provide program and construction management services for the arena while coordinating with other downtown projects.
7	15	2004	The city announced that it had signed a participation agreement with AEG to partner with the city in development of a downtown arena.
7	20	2004	Responses due for the program management team RFQ. Eight firms or teams responded.
7	22	2004	Cauthen memo to Councilmember McFadden-Weaver about MBE/WBE goals for arena contracts. Cauthen wrote that goals were discussed with AEG during a July 12 th meeting. The participation agreement requires AEG to comply with rules including paying prevailing wages and city affirmative action policies.
8	3	2004	Voters approved increased fees on rental car agencies and hotels to fund the arena.
8	6	2004	A seven-member committee interviewed seven teams or firms that responded to the RFQ for the project management team. The selection committee members were: City Manager Wayne Cauthen; Mayor Kay Barnes; Councilmember Deb Hermann; Assistant City Manager Rich Noll; Convention and Entertainment Centers Director Oscar McGaskey; Public Works Acting Director Stan Harris; and City Planning and Development Acting Director Bob Langenkamp.

Arena Construction Manager Selection

8	11	2004	The city selected the "KC Arena PM Team" to provide program and construction management services for the city's downtown arena project while coordinating with other downtown projects. The team includes: Burns and McDonnell, PC Sports, HNTB, Taliaferro and Browne, Astra Communications, Custom Engineering, AnLab, Wellner Architects, Leigh and O'Kane, and Krueger Technologies.
8	26	2004	<p>The City Council passed Ordinance 040965 to create the committee to select the arena architect. The ordinance notes that the committee is different from the composition defined in the city code due to the importance of the arena and the private investment involved.</p> <p>The arena architect selection committee's nine voting members were: Mayor Kay Barnes; City Manager Wayne Cauthen; Operations Committee Chair Terry Riley; Assistant City Manager Rich Noll; Acting Director of Public Works Stan Harris; Acting Director of City Planning and Development Bob Langenkamp; Director of Convention and Entertainment Centers Oscar McGaskey; a representative of Sprint; and a representative of the National Association of Basketball Coaches. The committee also included six non-voting advisory members. The ordinance allowed a representative of AEG to be present during selection committee meetings.</p>
9	3	2004	Responses to the RFQ for the downtown arena design team due.
9		2004	<p>The City decided to use the CM/GC at risk approach sometime in September or October 2004.</p> <p>Consultants from Burns and McDonnell and PC Sports, who work on the arena project as the program management team, began considering the CM/GC at risk approach for use by the City.</p> <p>The City Manager decided to use the CM/GC at risk approach on advice from consultants and the City Attorney.</p>
9	30	2004	Two architectural teams presented their qualifications to the city's selection committee at Bartle Hall. Each team had one hour to present, followed by 45 minutes for questions.
9	30	2004	The city selected a downtown arena design team led by HOK and Sports+Venues+Events, Ellerbe Becket, 360 Architects, Rafael Architects. The team also includes: Walter P. Moore Engineers, M-E Engineers, Bredson Associates, VSM Engineering, and Dubois Consultants.
10	28	2004	The City Council passed an ordinance approving the license fees to fund a downtown arena.

11	3	2004	<p>Rich Noll, Assistant City Manager, presented a summary of the Construction Manager/General Contractor at Risk to the City Council Operations Committee and, a couple of days later, to the Fairness in Construction Board. The two page document answers six questions:</p> <p>Why CM/GC at risk for the downtown arena? How is the CM/GC at risk selected? Why must we select the GM/GC at risk before design is complete? How will subsequent contracts for the construction of the downtown arena project be let under CM/GC at risk arrangement? Are construction firms familiar with this method of managing and constructing projects such as the downtown arena? Has an MBE/WBE goal been established for this project?</p> <p>The document notes that the city's selection is with the approval of AEG; the contractor may bid to self-perform some of the work; and that the project doesn't yet have MBE/WBE goals.</p>
11	4	2004	Council approved Ordinance 041263 condemning and taking private property for public use for the arena.
11	5	2004	The Fairness in Construction Board set goals for MBE/WBE participation for the arena project of 20 percent MBE participation and 12 percent WBE participation.
11	10	2004	The city began advertising the IFB as required by charter. The city advertised for ten days in <i>The Kansas City Star</i> , <i>Springfield News-Leader</i> , and <i>St. Louis Post-Dispatch</i> , beginning November 10, and nine days in the <i>Daily Record</i> , beginning November 11. The city also advertised on the Internet and sent notices to those who had requested notification of upcoming bidding opportunities.
11	17	2004	The City held a mandatory pre-bid conference for firms responding to the IFB. At the conference, firms asked questions to clarify their understanding of the city's requirements.
11	22	2004	<p>The city released addendum 1 to the IFB. The addendum answered questions raised by potential bidders at the pre-bid conference and questions sent to the city. It also:</p> <p>(1) changed bid due date from 11/30/2004 to 12/2/2004; (2) changed public bid opening date from 12/7/2004 to 12/8/2004; (3) changed "developer" into "AEG".</p> <p>The city changed the due dates to give bidders additional time to respond.</p>

Arena Construction Manager Selection

11	23	2004	<p>The city issued addendum 2 to the IFB, answering questions about the IFB. Several of the answers revised answers from addendum 1. It also:</p> <p>(1) changed the method of scoring the technical approach submittals and the maximum deduction points; and</p> <p>(2) changed the method of scoring the price change order submittal and the maximum deduction points.</p> <p>The city changed the scoring to help ensure selecting a firm that was qualified, and that price differences wouldn't have as much weight in the selection.</p>
11	24	2004	<p>The city issued IFB Addendum 3, making several minor changes such as updating the table of contents and replacing forms.</p>
11	30	2004	<p>The city issued IFB Addendum 4, answering questions about the IFB. The addendum also:</p> <p>(1) changed the public bid opening date from 12/8/2004 to 12/9/2004; and</p> <p>(2) set the date for interview as 12/7/2004.</p>
12	2	2004	<p>Responses to the IFB were due. Four firms or teams submitted bids: PCL Construction Services; JE Dunn/Hunt; Team Arena (a joint venture between Walton Construction Company, Greenleaf Construction Company, and Turner Construction Company); and MA Mortenson Company.</p>
12	2	2004	<p>City staff directed Burns and McDonnell to prepare a list of the criteria on which to evaluate the firms (as an aid to panelists in taking notes) and some questions for selection panelists to ask at the interviews. Four days later, city staff directed Burns and McDonnell that the panel would need to ask firms about compliance with MBE/WBE goals, plans for compliance in the Kansas City arena project, and if they felt there was anything that would make it more or less difficult to achieve goals in Kansas City compared to other cities</p>
12	3	2004	<p>CIMO sent a memo to members of the selection panel, including AEG, reminding the committee to consider prior experience (25 points), organization and key personnel (25 points), project understanding and approach (25 points), project controls (15 points), and safety and health submittal (10 points) as important facets in the selection.</p> <p>CIMO also sent members of the selection committee copies of the written technical submittals.</p>
12	6	2004	<p>Burns and McDonnell checked references for each of the bidders. They checked one reference for PCL, Dunn/Hunt, and Team Arena and two references for Mortenson. The information Burns and McDonnell collected wasn't provided to the selection committee.</p>

Cont'd			<p>Burns and McDonnell contacted:</p> <ul style="list-style-type: none"> • Mark Chipman (Winnipeg arena) as a reference for PCL, • Rick Pych (San Antonio arena) as a reference for Dunn/Hunt, • David Schneider (Jacksonville arena) as a reference for Team Arena, and • Arnold Perl (Memphis arena) and Tim Romani (Denver arena) as references for Mortenson. <p>One of Mortenson's references was Tim Romani, who represented AEG at the selection panel meetings. Romani told Burns and McDonnell that Mortenson was the best contractor out there and that Romani recommends Mortenson over all other contractors.</p>
12	7	2004	<p>The selection committee interviewed each of the four bidders at the Liberty Memorial Education Center. Each interview lasted about an hour, with 35-45 minutes for presentations and then time for questions and answers. The selection committee met after each presentation to discuss the information.</p> <p>After the meeting, Ralph Davis (CIMO staff who attended the selection meeting) sent an email to ask the City Attorney to attend a meeting on 12/8 to explain legal issues related to the selection and "what we are able to do with lowest and best."</p> <p>Rich Noll, who was a member of the selection committee, emailed that "we may issue a clarification on the cost element of the process. We may need to discuss the issue of rejecting all bids. We may have other questions."</p> <p>The selection committee had discussed what might happen if a bidder clearly "low-balled" the price.</p>
12	8	2004	<p>The selection committee met and reached consensus on the scoring for the technical portion of the selection process.</p>
12	9	2004	<p>The City Council passed Ordinance 041315 authorizing a \$3.9 million agreement with Burns and McDonnell to provide "phase I program management and site clearing services" for the arena. Burns and McDonnell worked to develop the draft IFB and help the city develop the CM/GC at risk approach under this contract.</p>
12	9	2004	<p>The city opened the sealed price submittals. Before opening the bids, staff read a statement describing the process, identifying members of the selection committee, and noting that AEG participated as a non-voting member. The city also read the consensus scores for each technical proposal before opening the price submittals.</p>
12	10	2004	<p>The city announced the selection of Mortenson.</p>

Arena Construction Manager Selection

12	13	2004	<p>The City Attorney wrote a memo to the Mayor and Council about the selection of the CM/GC at risk. He attached five documents to explain "the process and selection criteria, by which the lowest and best bidder was determined, for the downtown arena's construction manager at risk/general contractor and the role of the construction manager at risk/general contractor. I believe these documents also address several of the questions that have arisen regarding these topics over the last few days. I will also provide the Council legal advice on this matter in closed session during Thursday's business session."</p> <p>The City Attorney wrote, "a mandatory pre-bid conference was held on 11/17/04. A review of the notes from that pre-bid conference confirms that there were no objections or requests for modifications to the scoring methodology or the blending of the technical approach submittal score and the price submittal score to determine the lowest and best bid. This item did generate some discussion at the pre-bid conference, and a review of the questions and responses indicates that there was an understanding of how the interviews related to the price submittals..."</p> <p>The memo described the attachments: a section of the IFB about consideration of bids, the statement read by staff at the opening of the price bids, a tabulation of the bids and scores on each of the two steps of the selection process, a press release issued 12/10/04 about selecting Mortenson, and a description of role performed by the CM/GC at risk.</p>
12	16	2004	At a business session, the City Council discussed having the City Auditor review the process to select the CM/GC at risk.
12	16	2004	Council passed Committee Substitute for 041404 that authorized two agreements. One agreement with the downtown arena design team (a team led by HOK architects) for \$2.5 million; the other with the Bryan Cave law firm for \$0.7 million for legal services related to the arena. The city selected the downtown arena design team on September 30, 2004.
12	16	2004	<p>The City Council referred to the Operations Committee a resolution (041435) directing the City Auditor to review the solicitation, selection, and scoring process and report to the operations committee on January 12, 2005.</p> <p>The City Council referred to the Operations Committee an ordinance (041436) that would direct the City Manager to take no action to negotiate a contract with Mortenson until directed by the council. "...The Council has serious concerns about the selection panel's recommendation and wishes to review its recommendations, including the analysis, which concluded that M.A. Mortenson made the lowest and best bid."</p>
3	1	2007	Goal to complete the arena according to the Participation Agreement with AEG.

Appendix C

Criteria for a Valid Selection Process

We designed our work to answer:

- Did city staff and officials follow a valid selection process to recommend a construction manager for the downtown arena?

We developed criteria for a valid selection process by reviewing legal and regulatory requirements; reviewing good practices; and developing a framework for analyzing selection processes in general. Taken together these sets of criteria describe a valid process.

Legal and Regulatory Requirements

We reviewed the city charter and code, state statutes and the city's *Contract Guidebook*. The city decided to use a construction manager/general contractor (CM/GC) at risk approach rather than follow the established city methods for construction. The city has never used the CM/GC at risk approach before. We focused on legal and regulatory requirements that apply directly to the CM/CG at risk method.

- The City Charter defines how the city must advertise for bids for public improvements.
- State law requires that a CM/GC at risk's price be bid not negotiated, but does not exclude the use of qualifications in the selection process.¹¹

Good Practices

We reviewed prior audit work and *Contracting for Services*,¹² a best practices guide from the National State Auditors Association.

In prior audit work, we made recommendations about selections processes:

- Establish qualification/selection criteria before the fact.
- Use an open and publicized process; provide enough time for responding to encourage qualified bidders to participate.
- Follow city requirements to create a selection committee or, if there are no established requirements, consider diversity.
- Follow the contract guidebook processes.
- Inform participants about the process and update them about changes.
- Restrict and regulate contacts between bidders and city staff.
- Maintain the confidentiality of bidders' information.
- Use closed-ended contracts to control project costs.
- Consolidate construction projects into one city unit.
- Create oversight committees for major construction projects.

¹¹ RSMo. § 8.685 (2004).

¹² *Contracting for Services: A National State Auditors Association Best Practices Document*, National State Auditors Association, 2003.

The National State Auditors Association recommends relevant practices for the award process:

- Use an evaluation committee, comprised of individuals who are trained on how to score and evaluate the proposals and who are free of impairments to independence.
- Use fixed, clearly defined and consistent scoring scales to measure the proposal against the criteria specified in the RFP.
- Document the award decision and keep supporting materials.
- Carefully control bids upon receipt to ensure that they are not opened prematurely to give late bidding vendors confidential pricing information, bids are not accepted after the due date, inferior bids are not given extra opportunity to cure deficiencies, etc.
- Carefully check vendor references.

Selection Process Framework

We developed a framework built on the premise that a valid selection process allows the city to reach the goal; that the key players know and understand the goal and process; and that the key players follow the process.

The city's goal is to build and open a downtown arena by March 2007 without exceeding \$250 million. The process the city selected is to use a construction manager/general contractor at risk, selected by the city and approved by AEG.

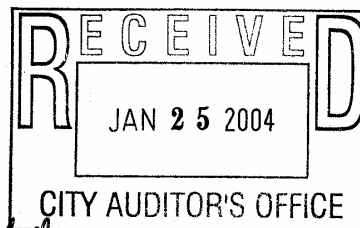
	Firms that could submit proposals	Selectors and their staff	City Council
Goal: build and open a downtown arena by March 2007 without exceeding \$250 million.	How did the city ensure that each of the key players knew and understood the goal? Did each of the key players know and understand the goal?		
Process: select a CM/GC at risk with the approval of AEG.	How did the city ensure that each of the key players knew and understood the process? Did each of the key players know and understand the process?		

Appendix D

City Manager's Response



Office of the City Manager



DATE: January 25, 2005

TO: Mark Funkhouser PhD, City Auditor

FROM: Wayne A. Cauthen, City Manager

SUBJECT: Arena Construction Manager Selection

First, I thank you and your staff for the thorough and professional review of the City's selection process for the Construction Manager/General Contractor at Risk (CM/GC at Risk) for the downtown arena project. A complex series of events has been succinctly analyzed and addressed, and I believe most anyone who reads this report will conclude the process followed by the selection committee was a proper and sound one and that the committee's recommendation of M.A. Mortenson as the CM/GC at Risk was unbiased and fairly derived. Of course, this is what I have believed from the start. Your findings should pave the way for the Mayor, City Council, and me to proceed with the important matter of completing the design and construction of the arena.

I could not agree more with your following statement on page 6:

"We found no evidence that the city's selection process was biased toward a specific result. The result of the consensus scoring reflected the committee's view that Mortenson's bid was the best for the city." (Emphasis added)

For all practical purposes, these two sentences say it all and address the concerns and questions that have been raised over the past 46 days. The process was unbiased and it resulted in a consensus recommendation that Mortenson's bid was the best. This conclusion, combined with the fact that Mortenson submitted the lowest overall price proposal, confirms the selection committee's recommendation that M.A. Mortenson is the lowest and best bidder for the CM/GC at Risk contract and that this recommendation was reached through a lawful process that treated all bidders fairly and without bias.

However, more needs to be said. Allegations of improprieties made over the past several weeks, by parties outside of this city's government dissatisfied with the results of the process, had the potential to undermine the citizens' confidence in their city government and tarnish the reputations of its elected and appointed officials; its business partner, Anschutz Entertainment Group (AEG); and of M.A. Mortenson. Your independent finding of an unbiased and fair process not only restores confidence and credibility in this process, which is now behind us, but also in future selections. Furthermore, your audit is thorough and directly refutes some of the allegations of improprieties and demonstrates that the others are without substance.

Before I address the two recommendations contained in your report, and I do agree with them both, I wish to encourage persons reading this audit to read it in its entirety and not limit their study to the summary or selected passages alone. I also wish to recap and address some of the key findings in the audit.

While I wholeheartedly agree with your findings that the selection process was unbiased and treated all bidders fairly, I do not totally agree with your finding that all key players did not understand the process. As your audit most accurately states, there has been confusion and misunderstanding about the process, and its credibility has been questioned, but I believe that confusion and misunderstanding is a result of the unsubstantiated allegations of improprieties and misinformation previously referenced. However, those individuals who served on the selection committee, and by consensus recommended M.A. Mortenson as the lowest and best bidder, understood the gravity of what they were doing and did not make their recommendation in a confused state. All the same, I do understand how others, who were not intimately involved in the process, could become confused given the atmosphere of incorrect information being communicated as fact.

I am particularly pleased that the audit includes the following findings:

- The Committee's Recommendation to Select Mortenson was Unbiased
- The Process Treated Bidders Fairly
- The process complied with legal requirements.
- Bidders had the same access to information and opportunities to present information
- Bidders understood construction manager at risk
- Consensus scoring was a reasonable process and consensus scoring has "significant benefits"
- Changing the Scoring Method Didn't Affect the Outcome
- Revised scoring weights for the technical approach resulted in minimal changes
- Revised bid scoring raised all bidders' scores (And as shown in exhibit 5 of the audit, the greatest beneficiaries of this change were PCL – 65 points – and Team Arena – 20 points. Dunn/Hunt benefited by 3 points and Mortenson by 2 points).
- IFB Didn't Favor Local or Nonlocal Firms
- IFB did not Require Identifying MBE/WBE Partners.... The IFB did contain an MBE participation goal of 20 percent and a WBE participation goal of 12 percent with the successful bidder required to meet the goals or make a best faith effort to meet them.

In regard to the finding that a lack of understanding and confusion about scoring and roles marred credibility, I again do not agree that those responsible for the making the recommendation were confused nor had reason to not understand their role or AEG's role in the process.

I believe AEG's role in the selection process was adequately communicated. The participation agreement, which is a public document, was circulated to numerous individuals, was clearly referenced in the IFB, and was available to anyone requesting a copy. It was also posted on the *Kansas City Star's* website. That document states, "The City shall select the project architect ("Architect"), subject to AEG's approval in its sole discretion.... The City shall select the general contractor for the Arena subject to AEG's approval in its sole discretion."

This point was highlighted in a press release dated July 15, 2004. The second bullet point in that press release states, "AEG will manage construction costs and cover any cost overruns, while the City with AEG's concurrence will select the project architect and contractor...." This matter was further highlighted in a press conference that same day in Mayor Barnes' office. Perhaps a word stronger than "concurrence" should have been used in the release, but AEG clearly had to concur with the selection for it to be valid.

On July 16, articles in the *Kansas City Star* and the *Kansas City Business Journal* reported the details of the participation agreement, and both noted the need for AEG's "concurrence" of the city's selection of an architect and general contractor.

Prior to the November 3 meeting of the City Operations Committee, our staff prepared a two page document titled "Summary of Construction Manager/General Contractor at Risk (CM/GC at Risk). In that report, under the sub-title "How is the CM/GC at risk selected," it is stated, "The City will select the cm/gc, with the approval of AEG, and the City will issue the contract." This document was provided to members of the City Operations Committee and reviewed by staff as part of a briefing on the CM/GC process at the November 3 City Operations Committee meeting and was made available to others in the City Council Chambers for that briefing.

This same document was provided to members of the Fairness in Construction Board at its meeting on November 5 where the MBE/WBE goals for the project were established and where the CM/GC process was also reviewed.

These are the readily documentable instances in which AEG's role in the selection process was publicly disclosed, and, while not immediately documentable, I believe that other public pronouncements regarding its involvement were made.

While some individuals may have misunderstood AEG's role in the process despite public disclosure, at least four members of the selection committee should have had substantial familiarity with AEG's role in the process. Mayor Barnes; Assistant City Manager, Rich Noll; and I all participated in the negotiations of the participation agreement, so we should be well aware of AEG's approval rights. Furthermore, as previously noted, Councilman Riley's City Operations Committee was briefed on the CM/GC process on November 3, and AEG's approval requirements were identified at that time. He had also been personally briefed on the CM/GC process by a member of my staff and the City's arena consultant two to three weeks prior to the November 3 meeting. While no specific meetings were held with Stan Harris nor Oscar McGaskey, the remaining members of the selection committee, they both participated in the selection of the design team, where AEG also had approval rights, and, as senior members of the City staff, they would be expected to be familiar with details such as these that had been publicly disclosed regarding AEG's role in the process.

In retrospect, as I expressed in my interviews with your staff, I now would have scheduled a business session with the full City Council to discuss the CM/GC at Risk process, the selection process for that contractor, and AEG's role in that process. However, I do believe I fulfilled my responsibility of adequately disclosing this information and ensuring that at least the four members of the City Council Committee responsible for recommending approval or denial of this contract to the full Council, and the Mayor, were familiar with the CM/GC selection process and AEG's role in that process.

While not addressed in the audit, I do believe it is important to state why this approval authority is so critical to AEG and to the completion and execution of the development agreement. AEG is committed to covering construction cost overruns and annual operating deficits. As such, AEG needs to have a voice in the selection of the design team and the general contractor so that it can exert adequate control over the risk it is accepting, on behalf of the City, of covering construction overruns and operating deficits for 35 years. These two guarantees from AEG were key components in the campaign for the hotel/motel and rental car license fees. AEG has repeatedly expressed that it would relinquish its right of approval but in doing so it would no longer accept the risk of construction overruns and annual operating deficits for the next 35 years.

Furthermore, to the very best of my recollection, at no time during the committee deliberations regarding the selection of a design team nor in the deliberations for the CM/GC at Risk did the AEG representative reference this approval right much less suggest exercising it.

In regard to the scoring process itself, the audit states: "Discussion at the selection meeting suggests that participants didn't fully understand the scoring system." As previously referenced, I think the selection committee performed its role properly and professionally. To the committee's credit, there was extensive deliberation on the scoring of the firms and how the technical merit scores interrelated with the scores of the pricing submittal. The committee members sought clarification from the team that had drafted the IFB, and ultimately requested that the City Attorney be present for further deliberations on the following day. Again, to the committee's credit, a final score was not derived until the committee was certain of its understanding of the scoring process and had deliberated further on the merits of all four competing firms. It is probably true that the committee did not fully understand the scoring system on Tuesday morning, but by Wednesday afternoon, when the final scores were determined, there is no doubt that the selection committee fully understood the scoring system.

As previously noted, the audit identifies the consensus method of scoring as reasonable and beneficial because it requires the members to thoroughly explore options. The committee's actions in this selection process illustrate the consensus methodology and its benefits in action. Furthermore, the ranking of the four firms never changed from the first straw poll to the final official scoring. Mortenson was always ranked first, Team Arena was always ranked second, and Dunn/Hunt and PCL were always ranked third and fourth. Even if there was initial confusion about the scoring system, there was never confusion in regard to the ranking of the four firms.

The audit also states that due to a tight time frame, portions of the IFB process were shortened including not completing reference checks prior to the committee making its recommendation and not extending the due date of bids the customary length of time after addenda were issued. I believe the process used and the time allotted should be based on the circumstances of the situation at hand, and that the ideal or preferred procedures are not always possible, and not always necessarily a notable draw-back to the process. In this case, all firms had individual references who served on the city's "arena team," including some individuals in the room that day. Furthermore, given the make-up of that team, even though not used as references, there were several people in the room that day who had extensive knowledge of all four firms and many of the individuals proposed to serve on each firm's downtown arena construction team. Likewise, while the due date for bids was not extended the customary period, it was extended from November 30 to December 2. None of the addenda contained burdensome additional

responsibilities for bidders and most responded to questions, clarified information, and identified changes in the process. There were no changes to specifications or drawings. I do not believe that a further extension of the due date would have had a substantive effect on how any of the firms addressed the pricing of the proposal or any of the five criteria on which the firm's qualifications were evaluated.

We would all appreciate the luxury of more time to complete our tasks and ensure that everything was done perfectly, but we have to do the best we can with the cards we are dealt and the time we are allowed. In this case, I believe we did a very good job. This audit clearly states that our process was unbiased, it treated bidders fairly, it was lawful, the consensus method of scoring was reasonable and beneficial, changes made after the issuance of the IFB did not impact the outcome, etc. In short, the process may not have been ideal or even what we would have preferred, but it was very good and produced an unbiased outcome that I believe will serve our city and our citizens well.

Finally, as previously stated, if I had it all to do over again, I would have had a business session informing the entire City Council of the CM/GC process and the associated selection process. This would have minimized questions and doubt about the process.

In regard to your two recommendations, I agree with them both.

1. Negotiated agreements between the City and AEG, the NABC, and Sprint will be presented to the City Council for deliberation and approval. The Development Agreement between the City and AEG has already been introduced to the Council and should be heard in committee on January 26. A management agreement with AEG will be forthcoming soon. Previous lease agreements and extensions of such with the NABC have traditionally been reviewed and approved by the Council as will any subsequent agreement, and the City's involvement in the agreement between Sprint and AEG will also receive Council review and approval.
2. Procedures for soliciting proposals for construction projects using the construction manager/general contractor at risk method will be added to the city's contract guidebook. These procedures will be identical or nearly identical to the procedures developed as part of the process that resulted in the recommended selection of the CM/GC at Risk for the downtown arena project.

My staff and I are available to discuss this response to your audit at your convenience.

Thank you again for the thorough and professional examination performed by you and your staff.